IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 134 of 1995

Date of decision 23.4.2007

Har Dei and others **…Appellants.**

Versus

Ishwar Dass and others **…Respondents.**

Coram

The Hon'ble Mr. Justice : Surjit Singh, Judge.

Whether approved for reporting?

For the appellants : Mr. K.D. Sood with Mr. B.N. Gupta, Advocates.

For the respondents : Mr. J.R. Thakur, Advocate, for respondent No. 1.

Surjit Singh, Judge (Oral)

A suit was filed against the appellants / defendants by the respondents / plaintiffs seeking a decree of possession of one Biswa area forming part of the court-yard of the plaintiffs, after dismantling a 'Jhungi' (thatched hut) put up by the appellants / defendants, illegally during the absence of the plaintiffs. It was pleaded by the respondents/ plaintiffs that some 'Abadi' area was jointly owned by four brothers (appellants / defendants represent the estate of two brothers, respondents / plaintiffs represent the estate of one brother) and that out of four brothers one had gone missing about forty years back and so the property belonged to the remaining three brothers and this way the plaintiffs were entitled to 1/3rd in the said 'Abadi' area.

Whether reporters of the local papers may be allowed to see the judgment?

2. Defendants contested the suit and alleged that the plaintiffs' predecessor had agreed to take only 1/4th share in the 'Abadi' area and the portion, on which they had put up the 'Jhungi', belonged to them as 3/4th of the total 'Abadi' area, had come to the share of their predecessors. Several other pleas were also raised, which it is not necessary to take notice of. However, it may be stated that no plea challenging the jurisdiction of the Civil Court had been raised, even though one of the substantial questions on which this Regular Second Appeal was admitted, pertains to the jurisdiction of the Civil Court.

2. Trial Court decreed the suit holding that the court-yard on a portion of which, to the extent of one Biswa area a 'Jhungi' had been raised by the appellants / defendants and which was depicted in Tatima, was part of the 'Abadi' area, which as per arrangement between the three brothers, was given to the plaintiffs' predecessor. Appeal was filed by the appellants in the Court of District Judge, which stands dismissed.

3. This appeal was admitted on the following substantial questions of law on 28.4.1995:-

> "1. Whether the court below erred in law in not deciding the question of jurisdiction though the point was urged and the civil court did not have jurisdiction to try this case in view of the peculiar circumstances of the case and in view of the judgment of the Full Bench in Chunia Devi's case? 1990 (1) Shimla Law Cases-223?
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> 2. Whether the court below has ignored the documentary evidence particularly Tatima, Ex. D I and FIR Ex. PW-1/A and the findings are vitiated for misconstruction and mis-reading of oral and documentary evidence, particularly the statement of Patwari?
>
> 3. Whether in the absence of demarcation and identity of land in the previous suit and in view of Tatima Ex. D-I the plaintiff's suit for possession and mandatory injunction was maintainable?"

4. I have heard the learned counsel for the appellants and gone through the record.

5. As a matter of fact, question No. 1 does not arise out of the pleadings on record. Appellants / defendants did not take any plea challenging the jurisdiction of the Civil Court in the written statement. Facts of Chunia Devi's case [1990 (1) Shimla Law Cases 223] referred to in this question were totally different and have no similarity not even semblance with the facts of the case in hand. Chunia Devi's case, referred to in substantial question No. 1, pertained to the jurisdiction of the Civil Court in the matters where there is a dispute between a land-owner and a tenant and the question involved is whether a person, who claims to be a tenant, is found a tenant or not and it is with respect to such question that in Chunia's case (supra) Full Bench of this Court held that Civil Court jurisdiction is barred. Learned counsel for the appellants admits that the question of jurisdiction is not involved in the present appeal.

6. The judgments of the two Courts below show that the entire evidence has been taken into account and the reasons advanced for coming to the conclusion that the property stands identified and the same is part of the court-yard of the plaintiffs / respondents, are well-founded and supported by the evidence on record. Hence question No. 2 is also answered in favour of the respondents / plaintiffs. For these very reasons question No. 3 is also answered in favour of the respondents / plaintiffs.

7. As a result of the above stated position, appeal is dismissed.

April 23, 2007 (BC) **(Surjit Singh)**
Judge